Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1999

CARMINE CARINI,

Petitioner-Appellant,

-against-

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was petitioner entitled to a Certificate of Appealability pursuant to 28 U.S.C. §2253(c)(2) to raise the issue of ineffective assistance of trial and appellate counsel where the grounds for appeal had it been both preserved by contemporaneous objection and raised by appellate counsel, would have almost certainly resulted in the reversal of petitioner's convictions.

PARTIES TO THE PROCEEDING

The parties to the proceedings are those named in the caption.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

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CARMINE CARINI,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Superintendent,
Greenhaven Correctional Facility,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Carmine Carini petition for a Writ of Certiorari to review the Order of the United States Court of Appeals for the Second Circuit in this case.

CITATION TO OPINION BELOW

The Order of the Court of Appeals is not reported but appears in the Appendix hereto. (App.A) The opinion of the District Court appears in the Appendix hereto (App B).

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 15, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On August 14, 1985, Carini was convicted by jury verdict of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of stolen property in the third degree in Supreme Court, Kings County. For these crimes, Carini was sentenced to concurrent terms in incarceration of twenty-five years to life on the murder conviction, five to fifteen on the criminal possession of a weapon charge, and one year on the criminal possession of stolen property charge. Carini's appeal to the Appellate Division, Second Department was denied on April 25, 1998. *People v. Carini,* 139 A.D.2d 753, 527 N.Y.S.2d 502 (2d Dept 1988). On August 15, 1988, Carini was denied leave to appeal to the New York Court of Appeals. *People v. Carini,* 72 N.Y.2d 916, 532 N.Y.S.2d 850 (1988).

During trial sworn No. 2, later failed to return to the court as 2:15 p.m., after the luncheon recess. When the court reconvened at approximately 2:30 p.m., the juror still was not present. The court thereupon indicated that it would wait a further ten (10) minutes and did so without the juror having reappeared.

The trial court reconvened again at approximately 2:40 p.m., and a roll call of the jury was with juror No. 2, failing to answer. At this point the trial judge stated:

> THE COURT: Under those (sic) circumstances, counsel, I think I waited. It is approximately twenty-five minutes later. It is now my intention to fill seat number two with the first alternate juror.

(T. 160).

It was at this point, without the trial court having made any attempt to investigate the cause that sworn juror was missing or take any steps to locate that juror and after a wait of few than thirty (30) minutes, the trial ordered Penny Moore to be improperly substituted as juror No. 2 for the missing Crystal Mills (T. 161-62). Ms. Mills did return to the courtroom and explained that she had a job interview over the luncheon recess. She apologized to the court and attempted to explain that she had tried to call the court (T. 182-83).

The record demonstrates that not only did the trial court act precipitously and without any kind of investigation of the juror's absence at all but that petitioner's trial counsel did nothing to see that the trial court followed the procedures for substituting jurors as set out by the Court of Appeals in its decision *People v. Page*, 72 N.Y.2d 69 (1988). In *Page*, the Court of Appeals required the trial court to make a "reasonable thorough inquiry and recitation on the record on the facts and reasons" for substituting a sworn juror. *Id.* at 73.

DISTRICT COURT PROCEEDING

In his petition, petitioner raised three claims: (1) that trial counsel was ineffective for failing to object to the

erroneous discharge of a juror; (2) that appellate counsel was ineffective for failing to raise the erroneous discharge of a juror as a basis for relief before the New York appellate court; and (3) that appellate counsel was ineffective for failing to raise the erroneous submission of an annotated verdict sheet to the petit jury.

In denying petitioner's claim of ineffective counsel, the district court first noted the New York State rule in 1988:

> In circumstances similar to those in Carini's case, the New York appellate courts have found substitutions of sitting jurors improper and have reversed convictions as a result. *See e.g., People v. Hewitt,* 133 A.D.2d 417, 519 N.Y.S.2d 555 (2d Dept. 1987) (reversal when juror discharged after one hour absence without adequate inquiry); *People v. Celestin,* 150 A.D.2d 385, 540 N.Y.S.2d 825 (2dDept. 1989) (reversal when juror discharged after fifteen minute absence without adequate inquiry). *People v. Fernandez,* 137 A.D.2d 709, 524 N.Y.S.2d 374 (2d Dept.1988); *People v. Pierce,* 97 A.D.2d 904, 470 N.Y.2d 737 (3d Dept. 1983); *People v. Burns,* 118 A/D.2d 864, 500 N.Y.S.2d 545 (2d Dept. 1986); *see also People v. Hopkins,* 76 N.Y.2d 872, 561N.E.2d 882, 560 N.Y.S.2d 982 (1990).

The district court did determine however, had there been a contemporaneous objections and raised by appellate counsel, a reversal would have certainly been granted:

> In this case, it is not disputed that Carini's trail counsel failed either to object to the substitution of juror number two or to request further inquiry into the reasons for her absence. Thus, although this ground for appeal, had it been both preserved by

contemporaneous objection and raised by appellate counsel, would almost certainly have resulted in the reversal of Carini's convictions, under the circumstances here presented the court cannot conclude that Wallach acted outside "the wide range of professionally competent assistance," *Strickland,* at 690, 104 S. Ct. At 2066, in failing to raise it. Moreover, even if Wallach had raised such a claim, given the virtual certainty that such a claim would have been denied by the appellate court, Carini cannot now demonstrate any prejudice as a result of Wallach's decision. Carini's petition on this ground thus must be denied.

COURT OF APPEALS PROCEEDING

On March 15, 2000, the United States Court of Appeals for the Second Circuit denied petitioner's motion for a certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. The Decision Not Reviewed by the Court of Appeals Raises a Significant Question Concerning The Standard to Be Used Is Evaluating Effective Assistance of Counsel Claims to Appellate Counsel

"The federal right to effective assistance of counsel may be violated by an attorney's failure to raise a meritorious state law claim or defense." *Claudio v. Scully,* 982, F.2d 798, 803 n.5 (2d Cir. 1992). The right under the Sixth Amendment to the effective assistance of counsel extends to appellate as well as trial counsel. *Jones v. Barnes,* 463, U.S. 745, 754, 103 S.Ct. 3308, 2214, 77 L.Ed.2d 987 (1983). In evaluating the effectiveness of appellate counsel, the court uses the framework established by the Supreme Court in *Strickland v. Washington,* 466, U.S. 668, 104 S.Ct. 2052, 80 L.Ed2d 674, to judge effective assistance of trial counsel. *Mayo v. Henderson,* 13 F.3d 528, 533 (2d Cir. 1994).

Under *Strickland,* a defendant must demonstrate both prongs of a two part test. To demonstrate the first, or 'performance,' prong of the *Strickland* inquiry. Carini must show that appellate counsel's performance was "outside the wide range of professionally competent assistance," *Id.* At 690, 104 S.Ct. At 2066, and to satisfy the second, or 'prejudice,' prong, Carini must show that "there is reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104, S.Ct. at 2067. In order to prevail on an ineffective assistance of appellate counsel claim, Carini must show not "merely that counsel omitted a nonfrivolous argument" but that "counsel ommitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo,* 13 F.3d at 533. "'Generally, only when ignored

issues are clearly stronger than those presented [by appellate counsel], will the presemption of effective assistance of counsel be overcome.'" *Id.* (quoting *Gray v. Greer,* 800 F. 2d 644, 646 (7th Cir. 1985).

Significantly, the effectiveness of counsel must be judged according to the law in place "as of the time of counsel's conduct[.]" *Strickland,* 466 U.S. at 690, 104 S. Ct. at 2066. The court may not use "hindsight to second-guess [counsel's] strategy choices" nor required counsel "to forecast changes in the governing law." *Mayo,* 13 F.3d at 533 (citations omitted).

Here, the district court found that a New York appellate Court had reversed convictions for improper substitutions of jurors where the issue was perserved for review:

> In circumstances similar to those in Carini's case, the New York appellate courts have found substitutions of sitting jurors improper and have reversed convictions as a result. *See e.g., People v. Hewitt,* 133 A.D.2d 417, 519 N.Y.S.2d 555 (2d Dept. 1987) (reversal when juror discharged after one hour absence without adequate inquiry); *People v. Celestin,* 150 A.D.2d 385, 540 N.Y.S.2d 825 (2d Dept. 1989) (reversal when juror discharged after fifteen minute absence without adequate inquiry). At the time that the Appellate Division, Second Department denied Carini's appeal on April 25, 1988, however, New York courts denied such claims, even if meritorious, when they were not preserved for appellate review by contemporaneous objections or by a request by defense counsel for further inquiry by the trial court. (Citations omitted).

In this case, it is not disputed that Petitioner's trial counsel failed either to object to the substitution of juror number two or to request further inquiry into the reasons for her absence. As the district court held, although this ground for appeal, had it been both preserved by contemporaneous objection and raised by appellate counsel, would almost certainly have resulted in the reversal of Carini's convictions, under the circumstances here presented the court cannot conclude that Wallach acted outside "the wide range of professionally competent assistance," *Strickland,* at 690, 104 S.Ct. At 2066, in failing to raise it. However, petitioner was certainly entitled to have the Court of Appeals review the district court's determination, especially whether counsel's ineffectiveness in failing to properly perserve the claim for review will suffice as "cause."

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States courthouse, Foley Square, in the City of New York, on the 15 day of March two thousand,

Present:

HON. ROBERT A. KATZMAN,
HON. JOSEPH M. MCLAUGHLIN,
HON. JOHN R. GIBSON,
Circuit Judges.

Carmine Carini,
Petitioner-Appellant,

99-2011

v.

Christopher Artuz, Superintendent,
Greenhaven Correctional Facility,
Respondent-Appellee.

Appellant has filed, *pro se,* a motion for a certificate of appealability. Upon due consideration, it is ORDERED that the motion is denied and the appeal is dismissed. The appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: s/_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CARMINE CARINI,

Petitioner,

-against-

CHRISTOPHER ARTUZ, Supt., Greenhaven Correctional Facility,
Respondent.

----------X

99-CV-2043(ARR)

NOT FOR PUBLICATION

OPINION & ORDER

ROSS, United States District Judge:

By petition dated April 22, 1997, petitioner Carmine Carini ("Carini") seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For reasons described below, that petition is denied.

BACKGROUND

Late in the evening of November 18, 1983, Carini picked up Verdi Kaja from Kaja's apartment building and drove him a short distance down 72nd Street in Brooklyn. After driving for several blocks, Carini turn to Kaja, shot him in the head three times, and then pushed his body out of the car. Carini then sped from the scene. Kaja died from his wounds shortly thereafter.

On August 14, 1995, Carini was convicted by jury verdict of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of

stolen property in the third degree in supreme Court, Kings County. For these crimes, Carini was sentenced to concurrent terms of incarceration of twenty five years to life on the murder conviction, five to fifteen years on the criminal possession of a weapon charge, and one year on criminal possession of stolen property charge. Carini's appeal to the Appellate Division, Second Department was denied on April 25, 1988. People v. Carini, 139 A.D.2d 753, 527 N.Y.S.2d 502 (2nd Dep't 1988). On August 15, 1988, Carini was denied leave to appeal to the New York Court of Appeals. People v. Carini, 72 N.Y.2d 916, 532 N.Y.S.2d 850 (1988).

On July 18, 1991, Carini filed a motion seeking a writ of error coram nobis before the Appellate Division, Second Department, alleging that his appellate counsel was ineffective for failing to raise on Carini's direct appeal a claim based on the erroneous substitution of a juror during Carini's trial. This motion was denied by the Appellate Division, Second Department, on February 10, 1992. Carini's attempt to appeal this denial to the New York Court of Appeals was dismissed on May 20, 1992. On June 3, 1992, the Appellate Division, Second Department, denied Carini leave to reargue this motion, and on August 24, 1992, Carini's application to appeal this denial was dismissed by the New York Court of Appeals.

On May 23, 1995, Carini filed a motion pursuant to N.Y. Crim. Proc § 440.10 to vacate his conviction in Supreme Court, Kings county, on the ground that trial court had erred by submitting an annotated verdict sheet to the jury without consent of defense counsel. On August 2, 1995, the Supreme Court, Kings County, denied this motion. On October 31, 1995, the Appellate Division, Second Department denied Carini leave to appeal to the lower court's denial of motion. On February 22, 1996, Carini filed

an application for reconsideration of his motion to vacate his conviction pursuant to N.Y. Crim. Proc. § 440.10. This motion for reconsideration was denied by the Supreme Court, Kings County, on March 11, 1996.

On May 20, 1996, Carini filed a second motion for writ of error coram nobis, alleging that his appellate counsel was ineffective for failing to raise a claim based on the trial court's submission of an annotated verdict sheet to the jury without the consent of defense counsel. On September 23, 1996, the Appellate Division, Second Department, denied Carini's motion for a writ of error coram nobis.

On April 22, 1997, Carini filed the instant petition before this court.

DISCUSSION

In his petition, Carini raises three claims: (1) that trial counsel was ineffective for failing to object to the erroneous discharge of juror;[1] (2) that appellate counsel was ineffective for failing to raise the erroneous discharge of a juror as a basis for relief before the New York appellate court; and (3) that appellate counsel was ineffective for failing to raise the erroneous submission of an annotated verdict sheet to the petit jury.

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[1]It is unclear from the face of Carini's petition whether Carini intended to raise an ineffective assistance of trial counsel claim in his petition. In the interests of justice, however, the court reads the petition as having raised that claim.

I. Timelines Of Carini's Petition

As a threshold matter, the court must decide whether Carini's petition for a writ of habeas corpus was timely filed. Carini's petition was filed on April 22, 1997. The statute of limitations for habeas petitioners whose convictions became final before the effective dated of the Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-32, 110 Stat. 1214, is on year from the effective dated of the Act, April 24, 1996. Because Carini's petition was filed within that one year period, Carini's petition was timely filed. Ross v. Artuz, 150 F.3d 97, 103 (2d Cir. 1998).

II. Ineffective Assistance Of Trial Counsel

Carini alleges that "trial counsel's failure to object [to the discharge of a juror] consisted ineffective assistance of counsel because it is error for the trial court to dismiss sworn jurors without properly [sic] inquiry." Petitioner's Mem. Of Law, 4. Carini's petition on this ground is denied because Carini has procedurally defaulted this claim.

"It is well settled that all state remedies must be exhausted before a federal court may consider a state prisoner's petition for a writ of habeas corpus." Jones v. Vacco, 126 F.3d 408, 413 (2d Cir. 1997). In his direct appeal, Carini did raise an ineffective assistance of trial counsel claim in pro se brief that accompanied his appellate brief. In that pro se brief, however, Carini alleged ineffective assistance of trial counsel on that basic that "trial counsel failed to object to the trial judges [sic] continued interference in the questioning of witnesses and his failure to object to not using the court interpretor [sic] when his services were needed." Resp. Aff. Exh.B, at ii. In order to satisfy the exhaustion doctrine, the petitioner must have "fairly presented" the claim to the state courts, meaning that " both the factual and legal premises of the claim assert[ed]

in federal court' must have been brought to the attention of the state courts Daye v. Attorney General of New York, 696 F.2d 186, 191 (2d Cir. 1982)(en banc). Because of Carini did not present the factual basic of his instant ineffective assistance of trial counsel claim to the state courts in his direct appeal that appeal did not exhaust his current claim.[2]

Further, Carini's failure to raise his effective assistance of trial counsel claim on direct appeal will prevent this claim from being considered in the future by New York state courts. Appellants in New York courts may apply for leave to appeal to the New York Court of Appeals only once on direct appeal. See N.Y. Court Rules § 500.10(a). Although New York law provides for collateral review of criminal convictions, N.Y. Crim. Proc. § 440.10(2)(c) forecloses relief by this mechanism when sufficient facts appeal upon the record to permit review of the constitutional violation on direct appeal. In an analogous situation, the Second Circuit found that an ineffective assistance of counsel claim grounded on trial counsel's failure to object to the trial court's jury instructions was sufficiently clear upon the record to permit its review on direct appeal in New York courts. Reyes v. Keane, 118 F.3d 136, 139 (2d Cir. 1997) (counsel's failure to object to challenged jury instructions was sufficiently apparent on the record to allow ineffective assistance of trial counsel claim to be raised on direct appeal in state courts); see also People v. Santillana, 145 Misc.2d 567, 547 N.Y. S.2d 981 (Supreme Court, Kings County 1989) (claims of ineffective assistance of trial counsel were

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[2]Carini also did not raise an inefective assistance of trial counsel claim in his motion to vacate the judge of his convictions pursuant to N.Y. Crim. Proc. § 440.10. See Resp. Aff. Exh. J (Carini's motion to vacate judgment).

apparent on record, barring collateral review); see generally People v. Harris, 109 A.D.2d 351, 491 N.Y.S.2d 678 (2d Dept. 1985). Carini's claim of ineffective assistance of trial counsel arising from a failure to object to the discharge of a juror was also sufficiently apparent on the record to have allowed Carini to raise it on direct appeal. Because this claim could have been raised on direct appeal, but was not, the claim cannot now be raised in a motion to vacate the conviction pursuant to N.Y. Crim. Proc. § 440.10.

Thus, although this claim is deemed exhausted, because Carini can no longer raise it before a New York state court, it is procedurally barred under New York law, Reyes, 118 F.3d at 139, and as such, procedurally defaulted for purposed of federal habeas review. Coleman v. Thompson, 501 U.S. 722, 735, 111 S.Ct, 2546, 2557 at n. *, 115 L.Ed.2d 640 (1991). Because Carini has procedurally defaulted this claim and has not demonstrated either "cause and prejudice" for the default or that the court's failure to address this claim on the merits will result in a fundamental miscarriage of justice, id. at 750, 111 S.Ct. at 2565, the claim is foreclosed from consideration by this court. Ellman v. Davis, 42 F.3d 144, 147 (2d Cir. 1994).

III. Ineffective Assistance Of Appellate Counsel

Carini argues that his appellate counsel was ineffective for failing to raise claims arising from (1) the trial court's discharge of a juror during the course of trial and (2) the trial court's submission to the jury of an annotated verdict sheet without the consent of defense counsel. Because it is not disputed that Carini has exhausted these claims, the court considers them on the merits.

Both of these claims are based on underlying violations of state law. However, "[t]he federal right to effective assistance of counsel may be violated by an

attorney's failure to raise a meritorious state law claim or defense." Claudio v. Scully, 982 F.2d 798, 803 n.5 (2d Cir. 1992). The right under the Sixth Amendment of the effective assistance of counsel extends to appellate as well as trial counsel. Jones v. Barnes, 463 U.S. 745, 754, 103 S.Ct 3308, 3314 77 L.Ed.2d 987 (1983). In evaluating the effectiveness of appellate counsel, the court uses the framework established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, to judge effective assistance of trial counsel. Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994).

Under Strickland, Carini must demonstrate both prongs of a two part test. To demonstrate the first, or 'performance,' prong of Strickland inquiry, Carini must show that appellate counsel's performance was "outside the wide range of professionally competent assistance," Id. at 690, 104 S.Ct. at 2066, and to satisfy the second, or 'prejudice,' prong, Carini must show that "there is a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2067. In order to prevail on an ineffective assistance of appellate counsel claim, Carini must show not "merely that counsel omitted a nonfrivolous argument" but that "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." Mayo, 13 F.3d at 533. "'Generally, only when ignored issues are clearly stronger that those presented [by appellate counsel], will the presumption of effective assistance of counsel be overcome.'" Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985).

Significantly, the effectiveness of counsel must be judged according to the law in place "as of the time of counsel's conduct[.]" Strickland, 466 U.S. at 690, 104 S.Ct.

at 2066. The court may not use "hindsight to second-guess [counsel's strategy choices' nor require counsel "to forecast changes in the governing law." Mayo, 13 F.3d at 533 (citations omitted).

Carini's appellate counsel, Arnold Wallach ("Wallach") raised four issues in Carini's brief before the Appellate Division, Second Department. Wallach claimed (1) that the trial court had erred in admitting into evidence a page from the victim's record book; (2) that Carini was denied a fair trial by admission into evidence of sworn testimony by the victim's then eleven year old daughter; (3) that the evidence presented was insufficient to support Carini's convictions; and (4) that the admission into evidence of photographs of the crime scene was erroneous. Although the appeal was ultimately unsuccessful, each of the grounds raised by Wallach was a viable basis for relief under New York law and each ground had at least some foundation in the record. In his appellate brief, Wallach argued these grounds with a level of skill that clearly fell within "the wide range of professionally competent assistance," Strickland, at 690, 104 S.Ct. at 2066. Thus in order to demonstrate that Wallach was ineffective, Carini must demonstrate that not only were his underlying state law claims non-frivolous, but they were significantly more meritorious than the relatively strong claims Wallach raised in his brief.

A. The Erroneous Discharge Of A Juror

In the early stages of Carini's trial, prior to opening statements, juror number two was late in returning from a lunch break. After waiting approximately twenty five minutes, the trial judge replaced the tardy juror with an alternate. Trial Tr. 30-31. The extent of the trial judge's inquiry into the reason for the absence of juror number two

consisted of the following: "Any of you ladies and gentlemen [of the jury] know where Ms. Millis [juror number two] is? Any of you see her during the lunch hour?...[I]f she appears downstairs or anywhere, Mr. Flemming (phonetic), she is to be brought into my chambers," Trial Tr. 31. Defense counsel did not object to the substitution, but inquired only, "May I ask when was the last time somebody was in the room where she was supposed to be?" Trial Tr. 32.

N.Y. Crim. Proc. § 270.35 requires the discharge of juror in a criminal case when that juror is no longer available for service "by reason of illness or other incapacity, or for any other reason." In People v. Page, the New York court of Appeals interpreted this statute to require "a reasonably through inquiry and recitation on the record of the facts and reasons for invoking the statutory authorization of discharging and replacing a juror based on continued unavailability" in order to "safeguard the important right of defendant to be tried by jurors in whose selection the defendant has had a voice." 72 N.Y.2d 69, 73. 526 N.E.2d 783, 785, 531 N.Y.S.2d 83, 85 (1988).

In circumstances similar to those in Carini's case, the New York appellate courts have found substitutions of sitting jurors improper and have reversed convictions as a result. See, e.g., People v. Hewitt, 133 A.D.2d 417, 519 N.Y.S.2d 555 (2nd Dept. 1987)(reversal when juror discharged after one hour absence without adequate inquiry); People v. Celestin, 150 A.D.2d 385, 540 N.Y.S.2d 825 (2d Dept. 1989) (reversal when juror discharged after fifteen minute absence without adequate inquiry). At the time the the Appellate Division, Second department denied Carini's appeal on April 25, 1988, however, New York courts denied such claims, even if meritorious, when they were not preserved for appellate review by contemporaneous

objection or by a request by defense counsel for further inquiry by the trial court. People v. Fernandez, 137 A.D.2d 709, 524 N.Y.S.2d 374 (2d Dept. 1988); People v. Pierce, 97 A.D.2d 904, 470 N.Y.2d 737 (3d Dept. 1983); People v. Burns, 118 A.D.2d 864, 500 N.Y.S.2d 545 (2d Dept. 1986); See also People v. Hopkins, 76 N.Y.2d 872, 561 N.E.2d 882, 560 N.Y.S.2d 982 (1990). In this case, it is not disputed that Carini's trial counsel failed either to object to the substitution of juror number two or to request further inquiry into the reasons for her absence. Thus, although this ground for appeal, had it been both preserved by contemporaneous objection and raised by appellate counsel, would almost certainly have resulted in the reversal of Carini's convictions, under the circumstances here presented the court cannot conclude that Wallach acted outside "the wide range of professionally competent assistance,' Strickland, at 690, 104 S.Ct at 2066, in failing to raise it. Moreover, even if Wallach had raised such a claim, given the virtual certainty that such a claim would have been denied by the appellate court, Carini cannot now demonstrate any prejudice as a result of Wallach's decision. Carini's petition on this ground thus must be denied.

B. The Annotated Verdict Sheet

Prior to jury deliberations, the court handed copies of an annotated verdict sheet to the court clerk to be transmitted to the jury and to counsel. Trial Tr. 389. The verdict sheet listed the crimes with which Carini was charged and included a short parenthetical description of the offense immediately following it. For example, following the charge of 'murder in the second degree' was the notation 'intentional killing'. Exh.C to Petitioner's mem. of Law. Carini's trial counsel did not object to the submission of the annotated verdict sheet to the jury, nor did he expressly

consent to its submission. Trial Tr. 389.

New York Crim. Proc. § 310.10 allows the court to furnish verdict sheets with such annotations only with "the consent of the parties[.]" Under New York law as it exists today, the submission of such a annotated verdict sheet without consent of counsel, even without contemporaneous objection, constitutes reversible error. People v. Damiano, 87 N.Y.2d 477, 484, 663 N.E.2d 607, 611, 640 N.Y.S.2d 451, 455 (1996).

The case law, however, at the time that the Appellate Division, Second Department denied Carini's appeal on April 25, 1988, required defense counsel to make a contemporaneous objection in order to preserve such a claim. When preserved by contemporaneous objection, such claims regularly resulted in the reversal of convictions. People v. Brooks, 70 N.Y.2d 896, 519 N.E.2d 293, 524 N.Y.S.2d 382 (1987). Prior to the decision in People v. Damiano, however, New York courts routinely denied such claims if not preserved. People v. Mason, 176 A.D.2d 358, 574 N.Y.S.2d 591 (2d Dept. 1991); People v. Kelly, 201 A.D.2d 668, 609 N.Y.S.2d 825 (2d Dept. 1994); People v. Williams, 138 A.D.2d 430, 525 N.Y.S.2d 592 (2d Dept. 1988); People v. Monroe, 135 A.D.2d 741, 522 N.Y.S.2d 643 (2d Dept. 1987); People v. Owens, 69 N.Y.2d 585, 509 N.E.2d 314, 516 N.Y.S.2d 619 (1987); People v. Sanders, 70 N.Y.2d 837, 517 N.E.2d 1330, 523 N.Y.S.2d 444 (1987). Although New York courts at that time could address such claims even if un preserved "in the interests of justice[,]" such jurisdiction was generally denied. See, e.g., People v. Monroe, 135 A.D.2d 741, 522 N.Y.S.2d 643 (2d Dept. 1987).

Thus, given the virtual certainty that such a claim, if raised by Wallach before the Appellate Division, Second Department, would have been denied as unpreserved, the

court cannot conclude that Wallach was acting outside "the wide range of professional competence," Strickland, at 690, 104 S.Ct. at 2066, in failing to raise this claim or that Carini suffered any prejudice as a result. Carini's petition on this ground thus must be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of habeas corpus is denied. Because Carini has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(3) (1996), no certificate of appealability will be granted.

The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.

Allyne R. Ross
United States District Judge

Dated: December 1, 1998
Brooklyn, New York